BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY A. RANDLE	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. **1,046,398**
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Self-insured respondent requests review of the November 10, 2010 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on March 23, 2011.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The respondent stipulated that claimant suffered accidental injury arising out of and in the course of employment on October 12, 2008. But respondent denied that claimant provided timely notice of the accident. And in the alternative, respondent raised the issue of the nature and extent of disability, if any.

The Administrative Law Judge (ALJ) determined claimant provided timely notice of the accident and found claimant sustained a 10 percent functional impairment and as of July 15, 2009, a 58 percent work disability based on a 100 percent wage loss and a 16 percent task loss.

Respondent requests review of whether claimant provided timely notice of the accident as well as the nature and extent of claimant's disability.

Claimant requests the Board to affirm the ALJ's Award.

The issues raised on review before the Board are whether claimant provided timely notice pursuant to K.S.A. 44-520 and, if so, the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a juvenile correctional officer for respondent. She managed and watched over juveniles who are placed by the state into the correctional facility. She also made sure they did their everyday schooling and hygiene by doing hall checks every 15 minutes on two floors. This activity required her to climb 13-14 stairs between the floors throughout the 8-hour working day. If the juveniles got out of hand, she would have to physically restrain them.

On October 12, 2008, claimant was helping restrain a 5'6", 180-pound male who was fighting with 3 other individuals and she ended up on the floor. Claimant advised Lieutenant McGiver regarding soreness and pounding in her hip after she had completed her report regarding the altercation. The next day she was contacted by Captain L. Johnson. He had watched the altercation on videotape and observed claimant's fall to the floor. Captain Johnson asked claimant how she was doing and claimant replied she was sore.

Claimant testified that because the altercation had been captured on videotape Deputy Superintendent David Arnold had also reviewed the force tape (videotape) and then he also asked her how she was doing. These conversations occurred on October 13, 2008.

An incident report was prepared by claimant's supervisor, Lieutenant McGiver, and signed by claimant on October 14, 2008. Although a box on the report was checked to indicate she was not injured, claimant told Lieutenant McGiver that she was sore as a result of the incident. Claimant testified that at the time she was sore but did not think that she had been injured.

Claimant continued working but finally sought treatment for hip and back complaints in December 2008 with her personal physician. She was then seen by Dr. Donald Mead

who took x-rays of her low back and hip and prescribed Lortab as well as two weeks of physical therapy. In February 2009 an MRI was performed of her pelvis and low back which revealed minimal degenerative change at the low back. Claimant had a follow-up examination with her personal physician who ordered a bone scan that was within normal limits.

Dr. Zhengyu Hu, board certified physiatrist, then treated claimant from March 24, 2009 through June 23, 2009. Dr. Hu testified:

> Q. For what condition did you treat Ms. Randle -- or more specifically, did you come to a diagnosis of her condition?
>
> A. There's no definite diagnosis. I tried pretty hard tried to get a diagnosis, but without success. So basically I was treating her low back pain and bilateral thigh pain, anterior thigh pain, left worse than right.[1]

Dr. Hu treated claimant's low back with facet joint injections at L2-3, L3-4, L4-5 and L5-S1 which did not provide claimant any relief. The doctor also tried a Lidoderm patch, Ultram and Capzasin cream without much improvement. The last recommendation by Dr. Hu was for a spinal cord stimulator but claimant declined that treatment procedure. Dr. Hu concluded claimant was at maximum medical improvement and based on the AMA *Guides*[2] rated claimant with a 3 percent whole person functional impairment.

Claimant returned to work on July 3, 2009, but on July 15, 2009, she was unable to complete the physical requirements of training she was attending. Claimant has not returned to work since that date.

Dr. Edward Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at her attorney's request. On January 29, 2010, Dr. Prostic took a history from claimant and performed a physical examination. Claimant had tenderness at the lumbo-sacral junction at the left greater trochanter and also decreased sensation in the anterior left thigh. Dr. Prostic diagnosed the claimant with lumbar sprain and strain, meralgia paresthetica and trochanteric bursitis. The doctor recommended treatment to include iliotibial band stretching exercises, aerobic conditioning, trochanteric bursa injection and anti-inflammatory medicines by mouth.

---

[1] Hu Depo. at 5.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Based upon the AMA *Guides*, Dr. Prostic opined claimant has a 10 percent permanent partial functional impairment to the body as a whole. The doctor imposed permanent restrictions against lifting 30 pounds occasionally from knee to shoulder and minimize activities that are below knee or shoulder height. Claimant should avoid frequent bending or twisting at the waist, forceful pushing or pulling, and minimal use of vibratory equipment.

Bud Langston, a vocational consultant, conducted a personal interview with claimant on January 26, 2010, at the request of claimant's attorney. He prepared a task list of 20 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, the claimant was unemployed.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston. Although Mr. Langston had provided a task list including 20 tasks, the exhibit provided Dr. Prostic only had 18 tasks and he opined claimant could not perform 3 for a 16 percent task loss.

Initially, respondent argues that claimant failed to provide timely notice of her accident. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, **except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.** The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice. (Emphasis Added)

Claimant provided uncontradicted testimony that after the accident she told Lieutenant McGiver that she was sore but was told to get the reports done about the incident. The next day she was contacted by Captain L. Johnson. He had watched the altercation on videotape and observed claimant's fall to the floor. Captain Johnson asked claimant how she was doing and claimant replied she was sore. The Deputy Superintendent, David Arnold had also watched the videotape and likewise asked claimant how she was doing.

Clearly, respondent had actual knowledge of the accident. Claimant has met her burden of proof that she provided timely notice.

Respondent next argues that claimant suffered either a temporary injury or at best a scheduled injury to the thigh. This argument is premised in part upon a leading question posed to Dr. Hu which asked if his 3 percent rating was for thigh pain and he responded yes. But in his July 13, 2009 letter responding to respondent's request for an impairment rating Dr. Hu specifically stated that as a result of her October 12, 2008 injury claimant suffered a 3 percent whole person impairment. Moreover, Dr. Prostic provided specific reference to the portion of the AMA *Guides* he used in rating claimant at 10 percent to the whole person. The ALJ adopted Dr. Prostic's rating as more persuasive because he made specific references to the AMA *Guides*. The Board agrees and affirms.

The injury to claimant's low back is not an injury addressed in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial general disability benefits are governed by K.S.A. 44-510e, which requires claimant's wage loss to be averaged with his task loss.

In *Bergstrom,*[3] the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[4]
>
> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[5]

---

[3] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[4] *Id.*, Syl. ¶ 1.

[5] *Id.*, Syl. ¶ 3.

> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[6]

In the absence of *Bergstrom*, claimant's termination and efforts to retain her employment would have been an issue for the Board to consider in determining whether claimant's actual post-injury wages or her wage-earning ability should be used in computing her permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid. Consequently, claimant's actual post-injury earnings must be used in computing her permanent partial general disability. And the difference in claimant's pre- and post-injury wages is 100 percent. And that is claimant's wage loss for the permanent partial general disability formula.

Dr. Prostic provided a task loss opinion of 16 percent utilizing the task list prepared by Mr. Langston. No other task loss evidence was provided. Averaging the 16 percent task loss with the 100 percent wage loss results in a 58 percent work disability. The Board finds claimant has met her burden of proof to establish that she suffered a 58 percent work disability as a result of her October 12, 2008 accidental injury. The Board affirms the ALJ's finding.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[7] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

---

[6] *Id.*at 609-610.

[7] K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated November 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Bryce D. Benedict, Attorney for Self-Insured Respondent
Rebecca A. Sanders, Administrative Law Judge